

#### **IV. REMARKS**

##### **Interview History**

In a final rejection of the claims, mailed July 22, 2005, the Examiner continued to assert that a helical arm support was shown in the cited reference Stephens (U.S. Patent No. 5,331,989. A first interview was requested to clarify the basis for the examiner's rejection based on the disclosure of Stephens. In particular the Examiner was requested to indicate the specific portions of the specification and drawings that show a helix.

During a telephone interview with Applicant's Attorney on September 28, 2005, the Examiner agreed that the reference Stephens does not teach the use of a helical brace, as described in the claims of this application. This effectively removed the only support for the prior rejection based on anticipation. Accordingly, it was Applicant's Attorney's understanding that there were no valid rejections pending against the claims of this application and such claims appeared to be in condition for allowance.

The Examiner also indicated during the interview that a new non-final office action would be issued enumerating any issues still pending in the Examination of this application.

Based on the statements by the Examiner, Applicant filed a response on October 20, 2005 including amendments intended to clarify certain claim language to which the Examiner raised objections during the interview. In reliance on the Examiner's statements, no further arguments were presented by Applicant.

No written statement as to the substance of the telephone interview of September 28, 2005 was submitted by the Examiner, but there were no objections raised to the interview summary submitted by Applicant's Attorney in the responsive amendment filed October 20, 2005.

The Examiner then issued an Advisory Action mailed November 11, 2005, refusing to enter the amendments on the basis of new issues being raised by the amendments. Applicant was and still is unaware of any new issues raised by the amendments. Applicant submitted the amendments with intention of placing the claims in condition for allowance and maintains that these amendments should have been entered as a matter of right.

In a response to the 11/11 advisory action, on November 16, 2005, Applicant requested a telephone interview with the Examiner and the associated Supervisory Examiner Mr. Gregory Huson, for the purpose of clarifying the status of this application and resolving whatever outstanding issues may exist. At this point the Applicant had been placed in an untenable position and Applicant's right to a full hearing on the merits of the Examiner's rejection were significantly prejudiced by the Examiner's actions.

A telephone interview occurred on November 18, 2005 with Examiner Pham and Examiner Demille. Examiner Demille acknowledged that he had no prior connection with the application and had not had the opportunity to review the application or the prosecution history. During the interview, the Examiner renewed the rejection based on the reference Stephens, without offering any explanation with respect to her statements during the earlier interview.

As a result the Applicant has been forced to present the amendments and remarks through a Request for Continuing Examination with the associated expense and delay.

**Status of the Claims**

Claims 1, 2, 8, 9, 11-14, 18, 19, 24, 25, 27-30, 33, 34, 36-38, 40, 41, and 44 are amended. Claims 4, 5, 16, 21, 22, 32, and 42-43 are cancelled, Claims 1-3, 6-15, 17-20, 23-31, 33-41, and 44 are presented for further consideration.

**Summary of the Office Action**

Claims 1-3, 6-15, 17-20, 23-31, 33-41, and 44 stand finally rejected under 35USC102(b) on the basis of the cited reference Stephens, U.S. Patent No. 5,331,989. The Examiner is respectfully requested to reconsider her rejection in view of the above amendments and the following remarks.

Applicant has amended claims 1 and 34 to indicate that the convex or raised portion of the seat faces the arm as opposed to the exterior convexity of the portion of the cuff of Stephens. In addition it should be noted that the words "forward to rearward" also serve to distinguish this feature. Applicant submits that this amendment fully satisfies the rejection under 35USC 112.

Applicant has also amended claims 2, 11-14, 19, 24, 25, 27-30, 36-38, 40, 41, and 44 to provide proper antecedent basis and to resolve other objections. The Examiner is advised that elements recited in the preamble of a claim may properly provide antecedent basis. The objections to claim 33 are, therefore, mistaken.

### Discussion of the Cited Reference

The Examiner continues to rely solely on the cited reference Stephens, stating that, "Stephens shows every claimed feature of claim 1". Stephens summarizes the description of his walking aid at column 6, line 60 to column 7, line 26 as follows:

"Accordingly, the walking aid of this invention provides an elongated shaft which is curved in the forward direction to provide springing action and reduce impact forces on the user. The shaft is integrally connected to the handgrip which is upwardly and rearwardly inclined and forces the portions of the hand to more evenly bear the weight of the user, resulting in reduced stress on the user's wrist. An elongated cuff may also be integrally attached to the handgrip to provide support for the forearm and a restraint to keep it in proper alignment with the wrist and hand. The crutch or cane of this invention is preferably all one piece which can be sized in advance for different users. The angles and degree of curve, as well as its length, can be varied for different heights and weights of users. The shaft can be cut to the proper length for a particular user, and the foot member can be attached to the crutch with self-hardening epoxy adhesive. The longitudinal axis of the foot member is aligned with the direction of movement and the epoxy forms a hard, permanent knob, which anchors the foot in place on the shaft. The knob so formed will be in the proper position for replacement foot members, as needed.

Thus, this invention provides a lightweight, stable crutch or cane which can be constructed without adjustment parts which break and which increase the weight and noise of the crutch. This walking aid is especially adapted to align the hand, forearm and wrist of the user to reduce weight and stress on the wrist and to increase hand control of the crutch. The crutch or cane of this invention further reduces stress from impact forces because of the springiness provided by its bowed shaft. The walking aid of this invention also has a foot member which is stable through a greater range of motion, including lateral motion."

Applicant sets out the above excerpt to indicate what the inventor Stephens had in mind for his invention. It is important to note there is no reference to a helical member. Also of significance is the stated purpose of the upper engaging portion 65 upon which the Examiners places much reliance as a basis for the rejection for anticipation. The elongated cuff is designed

to provide support and alignment. As described above and throughout the reference, it is indicated that the support is provided by the lower forearm support and alignment is provided by the upper engaging portion. This is shown by the shape of the respective elements. The lower forearm support 53 extends underneath the wrist and is open at the top. The upper engaging portion 65 extends over the arm, but is open at the bottom. Element 65 of Stephens performs a different function than the helical brace of this invention, which is primarily for the distribution of forces away from the hand and wrist.

In an effort to support the premise that all of the elements of claim 1 are shown in Stephens, the Examiner indicates that Stephens has an attachment post with a coupling for releasably attaching a tool or appliance, referring to figure 14 of Stephens. This is an example of the Examiner's reliance on an inaccurate perception of a drawing as showing something that is not described in the specification of the reference. In this instance, the specification contradicts the Examiner's perception. The Examiner first likens the fixed foot member to an appliance or tool and the elongated shaft 11 as an attachment post (claim 1). Then the Examiner expands this speculative perception to indicate that the socket 45 in figure 14 makes the foot releasably attached (claim 15). The following appears at column 6, lines 23-28 of the cited reference:

"The foot member 30 is typically constructed from rubber or a similar resilient material. It has a socket 45 disposed in an upper portion thereof for receiving the lower end 15 of the elongated shaft 11. The socket will usually be slightly larger at its bottom end than at its top to cause a tighter fit on the shaft."

Applicant submits that a fixed foot member of a cane is not a tool or appliance and that the shaft 11 of the walking aid could not be used as an attachment post. There is no mention that socket 45 provides a releasable attachment for a tool or appliance. Stephens describes the foot as being attached by a self-hardening epoxy adhesive to form a hard, permanent knob. The overall structure of the walking aid of Stephens is described in the excerpt above as "all one piece". The Applicant submits there is no support for the Examiners assertions and that these assertions are based on a continuous misconception of what is shown in the figures. A person skilled in the art would not be lead by Stephens to use the shaft of Stephens as an attachment post or to place a coupling at the end of the shaft of Stephens on which appliances or tools could be releasably attached.

The Examiner has applied similar misconceptions with respect to the seat portion of applicant's device. These will be discussed in more detail below.

Applicant submits that the cited reference does not show "all" of the elements of claim 1, as a starter, in particular, Stephens does not show the attachment post and releasable coupling of claims 1 and 15 respectively. The Examiner's pervasive reliance on misconstrued figures becomes more apparent in the following discussion.

In the supplemental advisory action of November 18, 2005, the examiner finally indicates the specific portions of the cited reference Stephens upon which she relies. This is repeated below for convenience of reference:

"To any extent applicant's seat portion 4 is planar, so is the seat portion 27 of Stephens. The seat portion 27 of Stephen is a convex contour at 53 in figure 5. See also figure 1a, and the outside surface, opposite to the reference #27, is a convex surface from forward to rearward, and a brace 65 (note figures 4,5) constructed substantially in the form of a helix, the helix circumscribing an open space to accommodate the arm of the user, the brace 65 fixed to seat 27 and extending rearward therefrom. Note that Figures 4 and 5 show the brace 65 with a top edge higher than a lower edge, and therefore the brace 65 is constructed substantially in the form of a helix as recited. One tracing the top edge of the brace 65 from the lower edge in figure 4 would follow a helical path to the top edge of brace 65. This would broadly comprehend "substantially" in the form of a helix."

Enlarged annotated copies of figures 2-5 are attached as exhibits A and B for ease of reference through this response.

It should be noted at this juncture that the above comments relating to the convex seat portion are fully satisfied by the amendments filed with the 10/20 response. If the Examiner had entered those amendments, this issue would be resolved. It should also be noted that there are no new issues presented by the above, only a more detailed description of the original rejection. Applicant submits therefore that the Amendment submitted after final should have been entered as a matter of right, since it placed the claims in condition for allowance.

The first part of the Examiners statement is directed to the seat portion of Claim 1. The Examiner's attention is directed to the claims as amended, for example in claim 1, the seat is described as follows:

"a substantially flat, seat portion fixed to said grip and extending rearward therefrom in a plane transverse to said second axis, said seat portion having a raised contour from forward to rearward, facing the arm;"

The Examiner states as follows:

**"To any extent applicant's seat portion 4 is planar, so is the seat portion 27 of Stephens. The seat portion 27 of Stephen is a convex contour at 53 in figure 5. See also figure 1a, and the outside surface, opposite to the reference #27, is a convex surface from forward to rearward,..."**

The heel engaging portion 27 is shown in figure 5 of Stephens and the portion facing the arm is not flat, but concave from side to side. It is described as a channel for aligning the arm. It is therefore not flat. As a result, the heel engaging portion 27 acts to constrain the wrist from moving from side to side, and it channels the forearm so that the axis of the forearm will align with the axis of the heel engaging portion itself. There is no room for the wrist to flex from side to side.

As described in claim 1, applicant's seat portion is, in one embodiment, the surface on which the wrist rests, and includes a raised portion engaging the wrist from forward to rearward. This convex or raised contour allows the wrist to flex up and down as well as side to side. The flexing feature is described in the Applicant's patent application in paragraph [0018].

In the above statement, the Examiner refers to element 53 as a convex contour on seat 27. This is an important example of the Examiner misconstruing the figure. As shown in figure 5, element 53 is at the outside of the heel engaging portion 27, away from the arm. It does not engage the arm. In addition the convex contour at 53 extends from side to side not from forward to rearward. Further, the heel engaging portion 27 is clearly concave. This concave shape provides a channel formed by outer wall 57, rearwall 59 and inner wall 55 for receiving the arm in alignment with the walking aid (see column 4, lines 58-64). The

portion of lower forearm support portion 53 that faces the arm is shown in all of the figures to be concave not convex.

Since the walking aid of the reference Stephens does not have a seat portion as described in claim 1, it does not anticipate the subject matter of claim 1. This is also true of claim 34.

The next portion of the Examiner's statement is directed to the helical brace portion of applicant's device. The Examiner's attention is directed to the claims as amended, for example in claim 1, the helical brace is described as follows:

"a brace constructed substantially in the form of a helix, said helix circumscribing an open space to accommodate the arm of the user, said brace fixed to said seat and extending rearward therefrom, and

wherein said brace and said seat provide a series of individual supporting surface portions for bearing against the arm along the extent of the brace in response to movement of the arm within the brace, said arm movement being responsive to an external force applied to the brace in any direction, and wherein said individual supporting surface portions occur in separate, parallel planes, oriented substantially transverse to a longitudinal axis of the brace, and said transverse, parallel planes are displaced longitudinally on said brace and said seat."

The Examiner states that Stephens shows:

"... a brace 65 (note figures 4,5) constructed substantially in the form of a helix, the helix circumscribing an open space to accommodate the arm of the user, the brace 65 fixed to seat 27 and extending rearward therefrom.

A helix is defined as:

"A three dimensional curve that lies on a cylinder or cone and cuts the elements at a constant angle. Any spiral form or structure" (The American Heritage Dictionary of the English Language, © 1981)

In order for the Stephens upper engaging portion 65 to be in the form of a helix, it would have to have a "spiral form or structure." Applicant has spent many hours staring at Figure 5 to determine what in the structure of the walking aid of Stephens shows a brace formed as a helix. The Examiner has finally more fully explained this perplexing issue. The answer lies in the following words:

**"Note that Figures 4 and 5 show the brace 65 with a top edge higher than a lower edge, and therefore the brace 65 is constructed substantially in the form of a helix as recited. One tracing the top edge of the brace 65 from the lower edge in figure 4 would follow a helical path to the top edge of brace 65. This would broadly comprehend "substantially" in the form of a helix."**

To assist in understanding the substance of the above statement, Applicant has attached enlarged copies of figures 2-5 of the reference Stephens as exhibits A and B. Further reference numbers and lines have been inserted in the figures to highlight the specific features discussed. It is Applicant's understanding that the top edge of brace 65 is the edge designated by the reference numerals 101 and 102 extending from corner A to corner C of the upper engaging portion 65. The Examiner's position is that since corner A of edge 101/102 is shown higher than corner C than upper engaging portion 65, the edge 101/102 shows a brace formed as a helix and further that it teaches the properties of the helical brace stated in the above excerpt from claim 1. The description of the cited reference does not support the examiners contention.

At column 5, lines 36-52, the elongated cuff 51 of Stephens is described as follows:

**"in the embodiment of FIGS. 1-5, the elongated cuff 51 is also integrally joined to the handgrip at the rearward end**

of the handgrip. That is, the lower forearm support portion 53 of the cuff forms an upwardly inclined channel which is a continuation of the inclined back portion 26 of the handgrip; the inner wall 55 of the lower forearm channel and the inner wall 71 of the upper forearm engaging portion 65 are preferably an integral unit which forms an alignment means for an arm when it is inserted into the opening in the cuff. The cuff and handgrip are particularly contoured to conform to the forearm and the wrist and to provide a seat and a guide which supports the forearm and wrist in a desirable angle relative to the elongated shaft and the body of the user."

This illustrates the substance of the teaching of Stephens, namely an elongated cuff having upper and lower engaging portions contoured to fit the wrist to provide an alignment function. There is no mention of a helical or spiral form. The happenstance that corner A is higher than corner C is more a function of the skill of the draftsman of the drawings than any purposeful design of the cuff 65. The figures are clearly drawn in a perspective view looking slightly upward in figures 2 and 5 and slightly downward in figures 3 and 4. A person skilled in the art would not conclude that a brace member, formed as helix, would have beneficial properties from the disclosure of Stephens as a whole. Certainly nothing significant is taught by the relative heights of corners A and C from which a person skilled in the art could discern the helical brace of Applicant's device. As indicated above, the cuff 65 teaches an alignment function not support which further clouds the perception advocated by the Examiner.

The Examiner seems to ignore the full shape of the elongated cuff 51 and indicates that because edge 101/102 looks like it might trace a slight portion of a spiral that the whole upper engaging portion is shaped as a helix. The upper edge only defines the upper opening of the elongated cuff 51, it cannot define the

entire structure of the device. The position and shape of edges 103 and 104 must also be taken into consideration. Clearly the overall shape of the elongated cuff 51 does not show a helical structure.

The form of upper engaging portion 65 of Stephens, when considered in its entirety, is not a spiral. It is accurately described by Stephens an elongated cuff. In reality the upper engaging portion 65 provides an upper cuff and the lower support arm 53 provides a lower cuff. At column 2, lines 28-32 of Stephens the following language is used to describe the elongated cuff:

**"an elongated cuff is joined to the rearward end of the hand grip. The elongated cuff has a lower forearm support portion and an upper forearm engaging portion which provides alignment to the forearm and wrist of the user. <sup>1</sup>**

And further at column 5, lines 14-18 the cuff is described as:

**"The inner walls of upper and lower forearm-engaging portions are connected by the connection portion 63 of the cuff so that the arm is aligned and cannot move laterally towards the body without moving the cuff."**

The word "cuff" is used by Stephens throughout the application to describe the upper and the lower forearm support portion of the Stephens walking aid. The word helix or the word spiral is not used anywhere, yet the Examiner persists in relying on the incidental feature that because corner A of the upper edge 101/102 may appear higher than corner C of that edge, a helix is taught. This is not a teaching of anything useful except perhaps the imprecise nature of the drawing of Stephens. Applicant questions whether or not the drawing intends to show that corner

A is actually<sup>1</sup> higher than corner C or whether it is meant to show perspective.

There is no support for the Examiner's statement that:

**"This would broadly comprehend 'substantially' in the form of a helix".**

The Examiner in her analysis fails to consider the interactive structure of applicant's brace, as stated in the claims and again stated below:

**"wherein said brace and said seat provide a series of individual supporting surface portions for bearing against the arm along the extent of the brace, in response to movement of the arm within the brace, said arm movement being responsive to an external force applied to the brace in any direction, and wherein said individual supporting surface portions, occur in separate, parallel planes, oriented substantially transverse to a longitudinal axis of the brace, and said transverse, parallel planes are displaced longitudinally on said brace and said seat."**

The upper edge of the upper engaging portion 65 cannot provide this interactive response to movement and force. Again because of the lack of a disclosure of this feature, the cited reference fails to support the rejection based on anticipation.

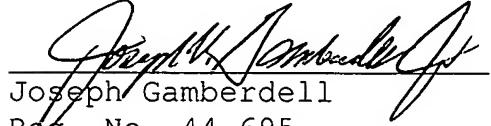
The Examiner is reminded that the anticipation analysis requires a positive answer to the question of whether the device of Stephens would infringe the claims of this application, if it were later. All of the claims of this application include the above helical brace member. The upper edge 101/102 of the device of Stephens, even if it is spiral in shape, does not constitute the brace formed as a helix of this application. In addition the edge or for that matter the cuff 65 cannot provide the supporting

structure described in the claims. Accordingly, there can be no infringement of the subject claims. Therefore, the teaching of Stephens does not support the rejection based on anticipation with respect to any of the claims.

For all of the above reasons, it is respectfully submitted that all of the claims now present in the application are clearly novel and patentable over the prior art of record, and are in proper form for allowance. Accordingly, favorable reconsideration and allowance is respectfully requested. Should any unresolved issues remain, the Examiner is invited to call Applicants' attorney at the telephone number indicated below.

A check in the amount of \$620.00 is enclosed for a two-month extension of time and RCE fee. The Commissioner is hereby authorized to charge payment for any fees associated with this communication or credit any over payment to Deposit Account No. 16-1350.

Respectfully submitted,

  
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